

# FAMILY LAW UPDATE

Cheryl Howell  
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# THIRD PARTY CUSTODY

# CONSIDER

- ◉ Same sex domestic partnership
- ◉ Twin children born through artificial insemination
- ◉ Years later, couple separates
- ◉ Non-bio partner seeks custodial rights
- ◉ How do you decide?

## *MASON AND ESTROFF (AND PRICE)*

- Parent may waive constitutional protection if voluntarily chose to create a family unit and permanently cede to third party a significant amount of parental responsibility and decision-making authority to create parent-like relationship between third party and child

# MASON AND ESTROFF

- Focus is not on whether conduct consisted of “good acts” or “bad acts”; rather volitional acts of the parent that relinquish otherwise exclusive authority to third party
- Need to consider both conduct and intent of parent

# HEATZIG V. MACLEAN

## ○ Trial court said:

- Bio mom did not act inconsistent with protected status
- Bio mom did abrogate her primary right to custody
- Non-bio partner should be granted “parental status”

# *HEATZIG V. MACLEAN*

- Court of Appeals said:
  - Fitness not the same as inconsistent conduct
  - Bad conduct or unfitness is not required
  - Question is intent by parent to create family
    - Did she cede authority to third party?

# SUPPORTING WAIVER

- ◉ Joint decision to become pregnant
- ◉ Sperm donor selected to share characteristics of non-bio partner
- ◉ Names of children
- ◉ Joint participation in parenting class
- ◉ Both present at birth
- ◉ Both signed birth certificate application
- ◉ Baptism ceremony
- ◉ Shared health care authority

# AGAINST WAIVER

- ◉ Bio mom had been trying to have children before this relationship
- ◉ Bio mom made timing/methodology decisions alone
- ◉ Couple did not create parenting agreement

# PARENT BY ESTOPPEL

- “A flawed and non-existent legal theory”
- District court is “without authority to confer parental status upon a person who is not the biological parent of a child”
- Adoption is the “sole means of creating the legal relationship of parent and child”
  - *Heatzig v. Maclean*

# SURROGACY CONTRACTS

- Pre-birth orders?????
- Traditional surrogacy
  - Probably not
- Gestational surrogacy
  - Maybe, but maybe not

# CONSIDER

## ◉ Custody order provides:

- “Joint custody”
- Every other weekend to dad
- Reasonable telephone contact for both
- Joint decision-making
- Notify each other re: medical emergencies

# CONSIDER

- Contempt order against mom - jail time suspended on condition that:
  - Mom and dad talk before making decisions
  - During mom's time, mom will schedule activities Dad must stay away unless invited
  - Mom makes medical decisions when child with her
  - Mom and dad shall not speak at exchanges
- Okay?

# *JACKSON V. JACKSON*

- ⦿ Cannot modify custody order unless motion to modify is filed by a party
- ⦿ Court cannot modify on own motion
- ⦿ Court cannot modify to punish contempt

# PARENTING COORDINATOR

- Court can appoint coordinator on own motion
  - GS 50-91(b)
- Must find:
  - High conflict
  - Ability to pay
  - Best interest

# CONTEMPT FOR VISITATION PROBLEMS

- ◉ Appropriate when parent prevents visitation
- ◉ Probably not when parent fails to facilitate visitation (unless specifics in order)
- ◉ Purge conditions must be specific and clear
- ◉ No jail unless necessary to protect best interest of child
  - See Bench Book Custody Chapter pp 4-57

# CHILD SUPPORT

# CONSIDER

- ◉ Dad receives \$125,000 workers' compensation settlement
- ◉ Seven months later - hearing on motion to modify
- ◉ Is settlement included as dad's present actual income?

# INCOME FROM ANY SOURCE

- ▣ Long list in guidelines
- ▣ Income received on “irregular, non-recurring or one-time basis”
- ▣ Court may “average or pro-rate the income over a specified period”, or
- ▣ “Require obligor to pay a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.”
  - *See Spicer* (settlement proceeds)
  - *Cf. Glass* (bonuses)

# *FELTS V. FELTS*

- ◉ \$125,000 workers' compensation settlement all counts as actual income
- ◉ Okay to average income over 17-month period before settlement and 12-month period following receipt of settlement

# MODIFICATION

- ◉ Requires change since last non-temporary order
- ◉ Motion needs detail
- ◉ Change in income not enough alone
  - *Devaney v. Miller*
  - Unless 3 year / 15% rule applies?

# PATERNITY

- ⊙ Award of reasonable attorney fees allowed as part of costs in discretion of court
  - GS 6-21(10)
  - NOT pursuant to GS 50-13.6
- ⊙ But maybe not against mom??
  - *Guilford Cty ex. rel Holt v. Puckett*

ALIMONY

# CONSIDER

- ⦿ Adult son living in basement apartment in mom's house (dependent spouse)
- ⦿ Is rental value considered mom's income?
- ⦿ Should you attribute part of mortgage and utility bill to son?

# *BROWN V. BROWN*

- ◉ Impute rental income?
  - Not without bad faith
- ◉ Share expenses?
  - Not if expenses are otherwise reasonable

# ANNULMENT

- ◉ No default judgment
  - Even as Rule 37 discovery sanction
  - *Thompson v. Hawkins*
- ◉ All allegations in “divorce” pleadings are deemed denied
  - GS 50-8
  - *See Phillips v. Phillips*, 185 NC App 238(2007)(alimony)
- ◉ Court must find facts
- ◉ Role of default in “divorce” cases ????